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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CHRISTOPHER S. NOLAN

Appeal 2007-1446
Application 09/684,032
Technology Center 3600

Decided: March 27, 2008

Before TONI R. SCHEINER, DONALD E. ADAMS, and ERIC GRIMES¹,
Administrative Patent Judges.

ADAMS, *Administrative Patent Judge.*

DECISION ON REQUEST FOR REHEARING

Appellant has requested rehearing of the decision entered December 19, 2007 (hereafter “Decision”). The Decision affirmed all rejections of record. The request for rehearing is denied.

¹ Administrative Patent Judge Grimes has replaced Administrative Patent Judge Linck who retired from the U.S. Patent and Trademark Office. *See In re Bose Corp.*, 772 F.2d 866 (Fed. Cir. 1985).

DISCUSSION

1. The rejection of claims 1, 2, 5, and 6 under 35 U.S.C. § 102(b) as being anticipated by Fell.

Appellant directs attention to page 4 of the Examiner's Answer asserting that the Examiner agreed during prosecution that Fell "does not explicitly disclose a liner with an access opening along at least one of the side panels" (Req. Rhg. 2-3) (emphasis removed). The Examiner makes this statement with regard to a rejection under 35 U.S.C. § 103(a) (*see* Ans. 4). However, when read in the context of the entire Answer it is clear that the Examiner's choice of the term "explicitly disclose" means that Fell does not exemplify a liner with an access opening along at least one of the side panels. Appellant's intimation that the Examiner conceded that Fell does not teach the claimed invention is contrary to the Examiner's maintenance of an anticipation rejection over this same reference. While Fell does not exemplify a liner with an opening along at least one of the side panels, Fell teaches this configuration to a person of ordinary skill in the art (*see* Decision 4-5). Accordingly, we are not persuaded by Appellant's argument.

According to Appellant "[b]y merely stating that a 'similar' liner could be used in various types of shipping vehicles, Fell simply does not provide an express disclosure of the claimed liner having an access opening along at least one elongated side panel" (Req. Rhg. 3). Instead, Appellant asserts that "the liner having an opening in an end panel described in [Fell] . . . could be used in a shipping vehicle having opening doors along a side wall as well as an end wall, but without also having an opening in an elongated side panel" (*id.* (emphasis removed)). Appellant is correct, Fell teaches a liner with an opening in the end that can be used in a shipping

vehicle with doors in the end. This *same* liner may also be used in a shipping vehicle that not only has doors in the end but also in the side. However, Fell also teaches that “a *similar type liner* could be applied to a shipping vehicle having side walls, and opening doors in at least one of the walls, the shipping vehicle could be . . . in the case of rail transport, a freight car (Fell, col. 8, ll. 28-34)” (Decision 5 (emphasis added)). In this regard, we emphasize that Fell teaches

a liner having sides adjacent the walls of a shipping vehicle, wherein the side of the liner adjacent the shipping vehicle door opening has at least two apertures in the upper portion of the liner for loading and at least one aperture in the lower portion for unloading (Fell, col. 2, ll. 13-23).

(Decision 4.) Therefore, Fell teaches that in a shipping vehicle having side walls and opening doors in at least one of the walls the openings will be adjacent the shipping vehicle door – on at least one of the side walls. Accordingly we are not persuaded by Appellant’s assertion to the contrary.

Having found that Fell teaches Appellant’s claimed invention we do not address Appellant’s arguments concerning inherency (Req. Rhg. 4-5).

2. Claims 1, 2, 5, 6, 13, and 17 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Fell.

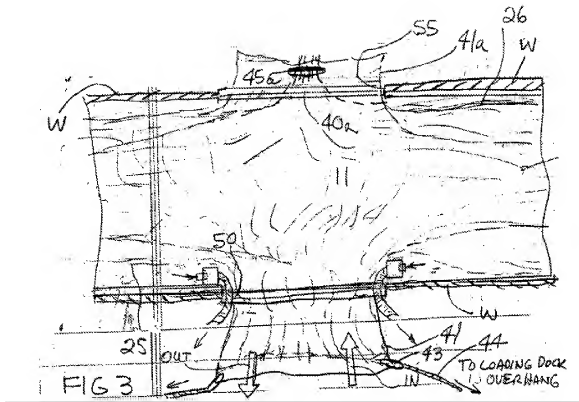
Claim 1:

According to Appellant “[s]ince anticipation is the sole basis for affirming the rejection of claim 1, Appellant respectfully submits that reversal of the rejection of claim 1 on obviousness grounds is in order” (Req. Rhg. 5). Having found that Appellant has not shown that we misapprehended or overlooked any points in the Decision we are not

persuaded by Appellant's arguments regarding claim 1. Claims 2, 13, and 17 fall together with claim 1 (Decision 6).

Claim 5:

Appellant asserts that “the Board appear[s] to take ‘official notice’ that ‘rail freight cars do not have door openings in their ends and usually have openings along their mid point’” (Req. Rhg. 7). In this regard, Appellant asserts that the Board has inappropriately relied “on ‘common knowledge’ without evidentiary support in this record” (*id.*). According to Appellant “[t]here are many configurations of rail freight cars . . . , and the mere incantation of a ‘rail freight car’ does not mean it must have a door opening along its side or a liner having an access opening along at least one elongated side panel” (Req. Rhg. 7). We are not persuaded. Appellant fails to appreciate the context in which Fell uses the term “rail freight car”. Specifically, “[a]s discussed above, Fell teaches a liner for a shipping vehicle, such as a rail freight car, which has side walls, and opening doors in at least one of the walls (Fell, col. 8, ll. 28-34)” (Decision 6). Thus, in context, Fell is not referring to any “rail freight car”; to the contrary, Fell is referring to a rail freight car that has side walls and opening doors in at least one of the walls. Appellant refers to the rail car defined by Fell as “a standard rail car having a side opening door” (Spec. 2). In this regard, we note that Appellant's Figure 1 provides a perspective view of such a well known, conventional, and immediately recognizable rail car which has a door on the side walls (Spec. 6 and Fig. 1). In addition, we direct attention to Appellant's Figure 3 reproduced below:



“Figure 3 is a top view with a cross section through the walls of the container, and illustrating a second opening on the opposite wall of the container to allow transfer of cargo from either side” (Spec. 6: 20 - 7: 2). “As illustrated, the access opening 40 is preferably positioned at approximately the midpoint of the side panel 25, which corresponds to a conventional rail car side doorway 50 (see open position in Figure 3)” (Spec. 10: 1-4 (emphasis added)). “[A] second doorway 55 can be made functional on the opposite side of the container 10 through a second opening 40a and tube 41a” (Spec. 10: 9-11). Accordingly, Appellant’s assertions regarding a “rail car” lack merit on this record.

For the foregoing reasons we are not persuaded by Appellant’s argument.

Claim 6:

Appellant asserts that “the Board appears to take ‘official notice’ regarding the presence of multiple openings in a ‘rail freight car’” (Req. Rhg. 8). According to Appellant, “the Board respectfully makes an assumption that is unwarranted based on the evidence of record . . . it is based on mere speculation as to what a skilled artisan would know” (*id.*). We are not persuaded. For the reasons set forth above, Appellant’s assertions lack merit on this record.

Appellant asserts that Fell “fails to teach openings in more than one panel of a liner, a point that is simply overlooked by the Board” (Req. Rhg. 8). To the contrary, the Decision specifically states:

Appellant asserts that Fell does not contemplate an opening “in a second side panel substantially opposite the first opening, as expressly required by the claim” (Br. 18). Fell contemplates rail freight cars, and many freight cars have doors on both sides of the car. A person of ordinary skill in the art would appreciate that when a liner is used in a rail freight car, the liner would have an opening approximately at the mid-point of each side of the rail freight car to allow for loading and unloading on either side of the car. “A person of ordinary skill is also a person of ordinary creativity, not an automaton.” *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1742 (2007). Obviousness is viewed through the lens of a person of ordinary skill in the art with consideration of common knowledge and common sense. *Dystar Textilfarben GMBH & Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1367 (Fed. Cir. 2006). “[A] court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR*, at 1741.

(Decision 8.) Accordingly, we are not persuaded by Appellant’s assertion.

Appellant asserts that since Fell teaches that “‘some means must be provided to tilt the container’ when it arrives at its destination” . . . one would not modify the liner in [Fell] . . . to include openings in more than one panel” (Req. Rhg. 8-9). According to Appellant “[w]hen tilting the container, some of the material within the liner would potentially exit the second opening and the user would not have control of the material” (*id.*). We disagree. Fell teaches that when the liner is full the loading and vent sleeves are tied up with tie-offs (Fell, col. 7, ll. 20-23). Fell teaches that these tie-offs are loosened to control the flow of the material through the discharge sleeve when unloading (Fell, col. 7, l. 68 - col. 8, l. 2). Obviously, a person of ordinary skill in the art would only loosen the tie-offs on the discharge sleeve on the side of the container that the material is discharged from. Therefore, contrary to Appellant’s assertion, there is no factual foundation for Appellant’s assertion that material could “potentially exit the second opening and the user would not have control of the material” (Req. Rhg. 8-9). Accordingly, we are not persuaded by Appellant’s argument.

3. Claims 3, 4, 12, and 16 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Fell and Krein ‘197.

Appellant asserts that Fell “fails to in any way teach or suggest a liner having an access opening along at least one elongated side panel. Since none of the secondary references cited by the Examiner provide this necessary teaching, the rejections to claims 3, 4, . . . 12, . . . and 16 should be reversed” (Req. Rhg. 10-11). For the foregoing reasons we are not persuaded by Appellant’s assertion.

4. Claims 7 and 8 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Fell and Derby.

Appellant asserts that Fell “fails to in any way teach or suggest a liner having an access opening along at least one elongated side panel. Since none of the secondary references cited by the Examiner provide this necessary teaching, the rejections to claims . . . 7 [and] 8 . . . should be reversed” (Req. Rhg. 10-11). For the foregoing reasons we are not persuaded by Appellant’s assertion.

5. Claims 14 and 18 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Fell and Krein ‘906.

Appellant asserts that “the Board fails to articulate any reasoning with some rational underpinning to support the combination of [(Fell)] . . . with the [Krein] ‘906 Patent” (Req. Rhg. 9). However, Appellant’s arguments go to the combination of Fell with the ‘197 Patent (Req. Rhg. 9-10). Since Appellant has not addressed the combination of references relied upon in support of the rejection of claims 14 and 18 we do not find Appellant’s arguments persuasive.

6. Claim 15 stands rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Fell and Paton.

Appellant asserts that Fell “fails to in any way teach or suggest a liner having an access opening along at least one elongated side panel. Since none of the secondary references cited by the Examiner provide this necessary teaching, the rejections to claim[] . . . 15 . . . should be reversed”

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(Req. Rhg. 10-11). For the foregoing reasons we are not persuaded by Appellant's assertion.

CONCLUSION

Appellant has not shown that we misapprehended or overlooked any points in the Decision. The request for rehearing is denied.

REHEARING DENIED

Ssc:

J. RALPH KING
KING AND SCHICKLI PLLC
247 NORTH BROADWAY
LEXINGTON, KY 40507